IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 02.08.2005

Coram:

The Honourable Mr.MARKANDEY KATJU,The Chief Justice

and

The Honouable Mr.Justice F.M.IBRAHIM KALIFULLA

Tax Case No.409 of 2001

The Commissioner of Income-Tax,
Madurai. … Appellant

vs.

M/s.Sumathi Process Industries (P) Ltd.,
Rajapalayam. … Respondent

Petition U/Sec.256(1) of the Income Tax Act 1961 and the High Court will be pleased to direct the Income Tax Appellate Tribunal, Madras Bench 'B' the State a case refer the following question of law.

1. Whether on the facts and circumstances of the case the Tribunal is right in law in holding that the assessee is entitled to carry forward of business loss relying on the Supreme Court's decision in the case of Kulu Valley Transport Co. Ltd (77 ITR 158) (which was rendered under the old Act?)
2. Whether the Tribunal is justified in law in allowing carry forward of loss when as per the amended provision of Section 139 (3) by Taxation Laws (Amendment) Act, 1970, the loss return filed beyond the time prescribed by Section 139(3) cannot be considered as having been filed within the time allowed under Section 139 (4)?

arising out of the order in RA No.736 (MDS)/1997 in ITA 4068 (MDS)/1989 dt. 15.9.97 on the file of the Income Tax Appellate Tribunal, Madras Bench 'B' against the order in PA-CX-9696-ITA 66/86-87 dt.10.8.89 on the file of the Commissioner of Income Tax (Appeals) II, Madurai.

against the order in 47-042-CX-9696/Co.II, Madurai dt. 26.11.1986 on the file of the Dy Commissioner of Income Tax Special Range II, Madurai-2.

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For Appellant …. Mrs.Pushya Sitaraman
Standing Counsel for
Income-Tax Department.

For Respondent …. No Appearance

O R D E R

THE HONOURABLE THE CHIEF JUSTICE

This is an Income-Tax reference on behalf of the Department under Section 256(1) of the Income-tax Act (hereinafter referred to as 'the Act') relating to the Assessment Year 1984-1985, in which the following questions have been referred to us for our opinion: -

3. 1.Whether on the facts and circumstances of the case the Tribunal is right in law in holding that the assessee is entitled to carry forward of business loss relying on the Supreme Court's decision in the case of Kulu Valley Transport Co. Ltd (77 ITR 158) (which was rendered under the old Act?)

2.Whether the Tribunal is justified in law in allowing carry forward of loss when as per the amended provision of Section 139 (3) by Taxation Laws (Amendment) Act, 1970, the loss return filed beyond the time prescribed by Section 139(3) cannot be considered as having been filed within the time allowed under Section 139 (4)?

2. Heard the learned counsel for the Department. None has appeared for the assessee, although notice has been served.

3. The facts of the case are that the assessee is a private limited company. For the assessment year 1984-85, the accounting period ended on 30.06.1983. The assessee filed a return of loss of Rs.9,64,601/- on 24.7.1985. This return was not filed within the time allowed under Section 139(1) of the Act.

4. The Assessing Officer assessed at "Nil" loss without allowing the benefit of carry forward of the same to be set off against the future income on the ground that the return was not filed within time.

5. On Appeal, the CIT (Appeals) held that though the assessee had not filed the return in terms of the provision of Section 139(1) of the Act, the return was filed within time allowed under Section 139(4) of the Act, and hence the assessee was entitled to the benefit of carry forward and set off of the business loss in the subsequent assessment year in view of the decision of the Supreme Court in CIT v. Kulu Valley Transport Pvt. Ltd., 77 ITR 158. The Department's appeal before the Tribunal failed, and hence this reference.

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6. It may be mentioned that prior to 1971, sub-section (3) of Section 139 did not empower the assessing officer to extend the time for furnishing a return of loss. However between 1971 and 1989, the amended sub-section (3) empowered the assessing officer to extend the time since in the Taxation Laws (Amendment) Act, 1970 it was provided that carryforward of losses may be permitted to an assessee if he has furnished a return of loss "within the time allowed under sub-section (1) or within such further time which, on an application made in a prescribed manner, the income tax officer, may in his discretion allow".

7. With effect from 01.04.89, the Direct Tax Laws (Amendment) Act, 1987 came into force, which again restored the old position prior to 1971, namely, that the assessing officer has no power to extend the time for filing return of income under Section 139(1) and to extend the time for filing under Section 139(3) a return of loss intended to be carried forward. However, since we are in this case concerned with the assessment year 1984-85, the law as between 1971 and 1989 will apply, and hence the assessing officer has in his discretion the power to extend the time for filing a return of loss.

8. In CIT v. Kulu Valley Transport Pvt. Ltd., (supra), the Supreme Court held that sub-sections (1) and (4) of Section 139 are to be read together, and hence the assessee would be entitled to carry forward a loss, if he has filed the return after the period prescribed by sub-section (1), but within the time allowed under sub-section (4). This view has been followed by the Gauhati High Court in CIT v. Naginimara Venner & Saw Mills (P) Ltd, 216 ITR 237 (GAU); Calcutta High Court in Basanth Kumar Bajoria v. CIT, 202 ITR 957 and Orissa High Court in CIT v. Orissa Metal Industries, 196 ITR 803., etc.

9. In view of the above, the reference is decided in the affirmative i.e., in favour of the assessee and against the department.

Sd/
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